

ASEAN's Human Rights Body: New Breakthrough for Human Rights Protection in South East Asian Region Some Preliminary Notes from Indonesia's Perspective

Arie Afriansyah¹

Abstract

On 21 November 2007, leaders of the Association of South East Asian Nations (ASEAN) promulgated the ASEAN Charter (the Charter). Not only does it provide legal basis for ASEAN's legal personality; it also provides new legal norms for its member states. One of those that need to be discussed is the establishment of ASEAN's Human Rights Body (the Body). This obligation is stipulated in Article 14 of the Charter, which stresses the commitment of member nations to protect human rights. However, the establishment of the Body has faced numerous pessimistic opinions regarding the organisation's capability to protect human rights considering its notorious reputation over this matter. The article is focusing on some areas of concerns that need to be looked at to put the Body into operation. Some important lessons from the European Human Rights Body is examined as comparison.

Introduction

On 21 November 2007, leaders of the Association of South East Asian Nations (ASEAN) promulgated the ASEAN Charter (the Charter). Not only does it provide legal basis for ASEAN's legal personality; it also provides new legal norms for its member states. One of those that need to be discussed is the establishment of ASEAN's Human Rights Body (the Body). This obligation is stipulated in Article 14 of the Charter, which stresses the commitment of member nations to protect human rights. However, the establishment of the Body has faced numerous pessimistic opinions regarding the organisation's capability to protect human rights considering its notorious reputation over this matter.

The cross-border movement of individuals across the region has cited serious violations of human rights from exploitation of human trafficking victims, refugees, and asylum seekers who are moving in search of protection from persecution, to relocation of migrant workers to find a better living in more affluent ASEAN countries where they are frequently subject to violations of their human rights (including labour rights). The latter experience was closely related to Indonesia's migrant workers in Malaysia and Singapore.

Many observers believe that despite the high spirit to protect human rights in the region, the Charter would have too diminutive power to restrain serious human rights violations because of the organisational policy of non-interference in members' relations to each other. The current situation in Myanmar is taken as an example. Continuous violations of human rights in the country show how

¹ Lecturer at Faculty of Law University of Indonesia

the ASEAN is not capable to uphold its Charter within its jurisdiction.² Thus, critics point out how the Charter loses its credibility when a member country, despite having signed and ratified it, fails to curtail human rights violations within its territories.

It is important to acknowledge that all the above-mentioned conditions within ASEAN are true. However, it is equally important that the organisation has taken many efforts to promote human rights within the region through ASEAN mechanisms. All the efforts to promote human rights in the area are significantly stipulated firstly in the Vientiane Action Programme in 2004. It puts human rights protection as one of the ASEAN's co-operations that would be implemented as a mid-term programme upon the creation of the ASEAN community. In the Charter, human rights have its priority position through the mandated establishment of a Human Rights Body.

It could be argued that this achievement should be regarded as the highest commitment of member states to acknowledge and to promote universal values of human rights. The Charter is expected to be a legal basis for ASEAN as an international organisation with its own constitution. Therefore, human rights have already been regarded as among the highest norms that all its member states must comply with. Besides that, it is significant to note that Indonesia, Malaysia, the Philippines, and Thailand already have independent national human rights bodies (national human rights institutions or NHRIs) prior to their adoption of the Charter.³ It shows that human rights promotion in this region is better than how it is perceived by some experts.

There are many challenges faced by the ASEAN amid its efforts to establish a human rights body. It is important to note some factors that should be considered concerning the Body. This article argues that there are some areas of concerns that need to be looked at to put the Body into operation. Some important lessons from the European Human Rights Body would be examined in comparison.

1. History of ASEAN

ASEAN is a regional organisation founded by Indonesia, Malaysia, the Philippines, Singapore, and Thailand on August 8, 1967. It was in Bangkok where then foreign ministers of those countries signed a Joint Declaration referred to as the ASEAN Declaration or Bangkok Declaration. ASEAN was originally designed as a vehicle for the collective efforts of the nations in the region to rise from the confines of their colonial past and take the challenges of economic stagnation, illiteracy and poverty.⁴

Prior to November 2007, the organisation operated without a formal charter. Many questioned the existence of the ASEAN as an international body due to its lack of international legal capacity. As its main choice, it has managed relations with a minimum of formality, with few legally binding arrangements, and with relatively weak regional institutions. ASEAN's founding document

² See Mann Bunyanunda, "Burma, ASEAN, and Human Rights: The Decade of Constructive Engagement, 1991-2001" (2002) 2 *Stanford Journal of East Asian Affairs* 118-135.

³ It could be seen at their membership at the National Human Rights Institutions Forum in Asia Pacific Region. Available at <http://www.asiapacificforum.net/members/apf-member-categories>, accessed at 20 February 2008.

⁴ Philippe Sands and Pierre Klein, *Bowett's of International Institutions*, (fifth edition, 2001) 229.

was a short-page “Declaration.” It had no criteria for membership other than location in Southeast Asia and adherence to some general principles of international behaviour.⁵ Over the years, ASEAN has entered into agreements⁶ that are technically binding on its members. However, it still has no central institutions to uphold compliance of members. There was no authoritative body to call a member-state to be liable for non-compliance with those agreements. Critics have always pointed out that the ASEAN has no plausible mechanisms for settling disputes in an authoritative and binding manner.⁷

The ASEAN Secretariat, as the sole executive body of the association, has remained feeble in terms of formal powers despite its strengthening in 1992.⁸ Although it has been given the mandate to take initiatives, its power in reality is too limited for it to fulfil its mandate with effectiveness. Because it lacked authoritative capacity, the ASEAN Secretariat could not call for compliance with ASEAN agreements or initiate arrangements or other actions to advance the organisation’s purposes. Further, in its external relations, ASEAN lacks a central authority to speak on the association’s behalf and conclude agreements with other organisations and states.⁹ Therefore, the ASEAN lacks juridical personality or legal standing under international law. This is a principal reason why it has been slow not only in putting up agreements but also in carrying those out.

a. The “ASEAN Way”

For a long period, the organisation has been observing a set of distinctive diplomatic norms such as the “ASEAN Way” which sets provisions for non-interference in the domestic affairs of member states. The ASEAN Way encourages its member nations to seek an informal approach in resolving conflicts through extensive consultation and discourse. The “comfort level” of members is an important prerequisite for ASEAN’s multilateral diplomacy wherein member states should pursue dialogue without being critical of each other in public.¹⁰

In reaching decisions for its association’s own good, ASEAN intends to reach consensus. Matters that could not solicit consensus are usually set aside. This decision-making process usually engages both officials and political leaders, who are given the chance to air any resistance to a proposed solution. Although it seems to be an unsettled mechanism, the process has been conducted frequently and has achieved conciliations that enable ASEAN members to openly speak about issues that they perceive to be important to the region.

This informal mechanism has served the association and its members positively. The “ASEAN Way” has enabled ASEAN to keep the peace among its members, promote regional stability, and play a constructive role amid volatility

⁵ The ASEAN Declaration (Bangkok Declaration), Bangkok, 8 August 1967. Available at <http://www.aseansec.org/1212.htm>, accessed at 20 February 2008.

⁶ The Treaty of Amity and Cooperation in Southeast Asia, The Southeast Asia Nuclear Weapons-Free Zone treaty, The agreement on the ASEAN Free Trade Area and The agreement on trans-boundary haze pollution

⁷ Rudolfo C. Severino, *Framing the ASEAN Charter. An ISEAS Perspective*, Institute of Southeast Asian Studies (2005) 6.

⁸ Protocol Amending the Agreement on the Establishing of the ASEAN Secretariat, 22 July 1992. Available at <http://www.aseansec.org/1198.htm>, accessed at 20 February 2008.

⁹ Agreements with third parties outside ASEAN always concluded together by member states’ leaders and not by the Secretary General of ASEAN on behalf of them.

¹⁰ David B. H. Denoon and Evelyn Colbert, “Challenges for the Association of Southeast Asian Nations (ASEAN)” (1999) 71(4) *Pacific Affairs* 506.

in global military and economic matters. The inevitable bilateral disputes have been managed and contained; some settled by legal or diplomatic means, certainly in non-violent ways.¹¹

However, in recent years, many member states have altered their firm obedience to the ASEAN Way.¹² When the Thai government proposed “flexible engagement” in 1998, the need for a timely modification of ASEAN diplomacy was raised. Through its Foreign Minister at that time, Thailand asked ASEAN to adopt a policy of flexible engagement, which involves discussions of associate members’ domestic policies. The idea was to bring up and discuss issues affecting the organisation’s members in a way that no party would perceive the action as interference to domestic sovereignty. Unfortunately, only the Philippines supported the proposal.¹³

Today, ASEAN has a framework called “retreats,” wherein matters of common concern are discussed by members outspokenly. The ministers have open discussions on various issues such as regional security, intra- and inter-regional cooperation, and the future direction of the region. In the ASEAN Ministerial Meeting in 2002, the foreign ministers “reaffirmed the usefulness of informal, open and frank dialogue ... to address issues of common concern to the region.”¹⁴ Thus, as Hiro (2004) opined, the long-established diplomatic manner of the ASEAN has been challenged where the principle of non-interference is interpreted in a more flexible way.¹⁵

b. The ASEAN Charter

Based on numerous considerations in a practical condition, member states of ASEAN formalised their common need of legal document as their “articles of association.” This common need was stipulated in the 2004 Vientiane Action Programme. The 10 member-nations hoped that the Charter would establish ASEAN as a juridical and legal entity. By clearly defining the association’s objectives, it would make it easier for ASEAN to advance towards those objectives.

Severino (2005) argued that the Charter would help make sure that agreements within ASEAN are complied with and implemented by member states. He also opined that it would make ASEAN institutions more effective by setting straight their functions and responsibilities. Further, it would strengthen the Secretary-General and the Secretariat by enhancing their statuses, enlarging their independence, and expanding their authority.¹⁶

As stated in the provisions, the Charter would be enforced only following ratification by all 10 member-states within 30 days.¹⁷ If all the members would ratify it, the Charter would establish ASEAN as a juridical and legal entity for

¹¹ See Timo Kivimäki, “The Long Peace of ASEAN” (2001) 38(1) *Journal of Peace Research* 5-25.

¹² See Hiro Katsumata, “Why is ASEAN Diplomacy Changing? From “Non-Interference” to “Open and Frank Discussions””, *Asian Survey*, Vol. 44, No. 2, April 2004, 237-254.

¹³ *Id.*, 238.

¹⁴ ASEAN, “Joint Communiqué, the 35th ASEAN Ministerial Meeting”, Bandar Seri Begawan, Brunei, July 29-30, 2002.

¹⁵ Katsumata, above n 9 and see Rizal Sukma, “The Future of ASEAN: Towards a Security Community”. Paper at a seminar on “ASEAN Cooperation: Challenges and Prospects in the Current International Situation”, New York, 3 June 2003. Available at http://www.indonesiamission-ny.org/issuebaru/Mission/asean/paper_rizalsukma.PDF, accessed at 20 February 2008.

¹⁶ Severino, above n 6, 28.

¹⁷ Article 47 para. 4 ASEAN Charter.

both its internal and external relations.¹⁸ However, up until now, only six of the 10 member-nations have agreed to make the ratification. Those are Singapore, Brunei, Thailand, Laos, Cambodia, and Vietnam.

2. *European Human Rights Mechanism: Lessons Learned for ASEAN*

Prior to the discussion about human rights mechanism in the ASEAN, it is significant to have another regional human rights mechanism as a model. There are at least three regional human rights mechanisms that are already established. They are in the European, African and American regions.¹⁹ Having considered their reputation and history, the author argues that European mechanism is likely to be the best example for ASEAN to follow.

Note that the development of human rights in Europe was not within the scheme of the European Union.²⁰ The human rights mechanism in the region started with the establishment of the Council of Europe (COE) through the Treaty of London in 1949.²¹ It involved 46 European states. The objective of the council was to achieve greater unity among its member states through common action, agreements, and debates. In line with that, only those states that meet the conditions for membership and those supporting pluralistic democracy, the rule of law, and respect for human rights were allowed to join the COE.

COE has set principal aims regarding human rights. Those were: effective supervision and protection of fundamental rights and freedoms, identification of new threats to human rights and human dignity, development of public awareness towards the importance of human rights, and promotion of human rights education and professional training.²² The decision-making body of the council consisted of the Foreign Affairs Ministers of the 46 member states, collectively called the Committee of Ministers (CM). The CM was made responsible for guarding the fundamental values of the COE and for monitoring member states' conformity with their obligations. The CM also overlooked the enforcement of judgements of the Court.

The CM usually achieved the enforcement of decisions through constructive dialogue with the state concerned. However, the Committee was prepared to bring political and diplomatic pressure so it could enforce any judgement. The success of the European Convention on Human Rights was attributed mainly to the effective monitoring and enforcement of decisions by this political branch of the COE.

¹⁸ See Locknie Hsu, "Towards an ASEAN Charter. Some Thoughts from the Legal Perspective" in Severino, above n 6, 45-51.

¹⁹ See B. Obinna Okere, "The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems" (1984) 6(2) *Human Rights Quarterly* 141-159 and Jack Greenberg and Anthony R. Shalit, "New Horizons for Human Rights: The European Convention, Court, and Commission of Human Rights" (1963) 63(8) *Columbia Law Review* 1384-1412.

²⁰ However, in 1996 the European Community accessed the ECHRFF to be the high contracting party of that convention. See Juliane Kokott and Frank Hoffmeister, "Opinion 2/94, accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedom" (1996) 90(4) *American Journal of International Law* 664-669.

²¹ A.H. Robertson, "The Council of Europe, 1949-1953-I" (1954) 3(2) *International and Comparative Law Quarterly* 235-255, 235.

²² See A.H. Robertson, "The Legal Work of the Council of Europe" (1961) 10(1) *International and Comparative Law Quarterly* 143-166.

The establishment of COE was followed by the adoption and signing of the European Convention on Human Rights and Fundamental Freedoms (ECHRFF) in 1950. To ensure the compliance to this convention, the European Court of Human Rights (the ECHR) was established in 1959.²³ The ECHR organised under the COE was a different and detached body from the European Court of Justice (the ECJ) of the European Union (EU). While the EU has evolved various methods of dealing with matters of human rights through the ECJ and other bodies, it is the COE that remains particularly focused on human rights. It should be noted that because of this, no state has ever joined the EU without showing its commitment to democracy and human rights by first joining the COE.

Before the adoption of the 11th Protocol in 1998 as the first Body to receive and examine all individual or state complaints against a member state for violations of the Convention, the European Commission of Human Rights (the Commission) was established. In cases where the parties were unable to reach a satisfying settlement, the Commission expressed its opinion as to whether or not there was a violation of the Convention. If the state had accepted the compulsory jurisdiction of the Court, any concerned or contradicting state and/or the Commission had three months to bring the case to the Court for a final adjudication.²⁴

In 1998, the Court was revised and strengthened by the 11th Protocol²⁵ to the European Convention, making it a single permanent body and replacing the previous system of complementary action by the Court and the Commission.²⁶ The Office of the Commissioner for Human Rights was established as an independent institution in 1999, following the dissolution of the Commission on Human Rights. The Commissioner, elected by the Parliamentary Assembly²⁷, is charged with the promotion of effective human rights protection in the member states.

The Commissioner for Human Rights is charged with four main activities: promotion of the education and awareness of human rights; encouragement of the establishment of national human rights structures and the facilitation of their activities; identification of short-comings in the law and practice with regard to human rights; and promotion of the effective respect and full enjoyment of human rights in all the member states of the COE.²⁸

²³ See A.H. Robertson, "The European Court of Human Rights", (1960) 9(1) *American Journal of Comparative Law* 1-28.

²⁴ See Elizabeth Heger Boyle and Melissa Thompson, "National Politics and Resort to the European Commission on Human Rights" (2001) 35(2) *Law & Society Review* 321-344.

²⁵ Council of Europe, ETS No. 155, "Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby". Available at <http://conventions.coe.int/Treaty/en/Treaties/Html/155.htm>, accessed at 20 February 2008.

²⁶ See Vaughne Miller, "Protocol 11 and the New European Court of Human Rights" Research Paper House of Commons Library. Available at <http://www.parliament.uk/commons/lib/research/rp98/rp98-109.pdf>, accessed at 20 February 2008 and Rudolf Bernhardt, "Reform of the Control Machinery under the European Convention on Human Rights: Protocol 11" (1995) 89(1) *American Journal of International Law* 145-154.

²⁷ Parliamentary Assembly of the Council of Europe is a deliberative body of the Council of Europe, composed of 315 representatives appointed by the 46 member States' national parliaments, represents the political forces in Europe. This highly adaptive organ is responsible for the preparation of candidate countries for membership and has successfully integrated the new Eastern European democracies into the COE, demonstrating what a useful tool the PACE is for European co-operation on a broad scale.

²⁸ Mandate of the Council of Europe Commissioner for Human Rights, available at http://www.coe.int/t/commissioner/Activities/mandate_en.asp, accessed at 20 February 2008.

The Commissioner may issue recommendations, opinions and reports; hold seminars and visit member states in order to gain an overall view of the human rights situation in a country; or examine an area or issue of particular concern. The Commissioner may not take individual complaints of violations of human rights, but could take initiatives of a general nature that are based on individual complaints. The task of deciding over such complaints is now left solely to the European Court.²⁹

It is obvious that the reform of the Court by the adoption of the 11th Protocol has resulted in the Court becoming the most accessible and therefore the busiest international court in the world. Any state or individual claiming to be a victim of a violation by one of the contracting states to the Convention may bring a case to the ECHR. It is noteworthy that all states party to the European Convention became parties to Protocol 11th that established the single permanent judicial body, thus allowing cases to be brought against it in the European Court by a pool of some 800 million people.

Judges of the European Court sit on the Court as individuals rather than representatives of their home countries. Although there are as many judges as contradicting states on the European Court, there is no limitation on how many judges may come from one country. They serve a six-year renewable term and could be removed for improper conduct of their office by a two-thirds majority vote of the Court.³⁰

An important issue for a court is what extends its jurisdiction over matter. The ECHR's jurisdictions are to hear cases from persons who think their rights under the Convention have been violated by the contracting states to the same Convention; and to give Advisory Opinions at the request of member states and organs of the COE and beyond the territory of Council of Europe member states.³¹

In relation to domestic judicial awards, it is important to understand that the Court is not empowered to overrule decisions of national courts (i.e. it could not revise, vary, or quash those decisions) or to annul national laws. However, it could have been different if the Court found a violation of the Convention, especially when the Convention has been incorporated into the national law of the state and considered as domestic legislation.³²

After the ECHRFF, there are many more human rights conventions adopted in Europe such as the European Social Charter (the Social Charter) that was created in 1961 (revised in 1996 as the economic and social counterpart of the ECHRFF); the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment that was put up in 1987; and the Framework Convention for the Protection of National Minorities that was drawn in 1995. There are now up to 25 conventions on specific human rights issues that members of the COE are parties to. However, only the provisions of the ECHRFF could be directly invoked in the European Court.

²⁹ Robertson, above n 22, 3.

³⁰ European Court of Human Rights, "Organisation of the Court", available at <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/Organisation+of+the+Court/>, accessed at 20 February 2008.

³¹ European Court of Human Rights, available at <http://www.echr.coe.int/ECHR/EN/Header/Applicouldts/Information+for+applicouldts/Frequently+asked+questions/>, accessed at 20 February 2008.

³² Id.

3. Human Rights Mechanism Development in ASEAN

The creation idea of human rights mechanism in ASEAN could be traced back to the *Joint Communiqué* of the 26th ASEAN's Ministerial Summit in Singapore on July 1993. This idea was followed by the establishment of Working Group for ASEAN Human Rights Mechanism in 1996. The establishment of this working group was then followed by the creation of National Human Rights Commission in four ASEAN's member states, i.e. Indonesia, Malaysia, the Philippines, and Thailand.

ASEAN's member states also agreed in Vientiane Action Programme in 2004 to put human rights protection as one of the ASEAN's co-operations which would be implemented as the mid-term programme in the creation of the ASEAN community. During the 2007 ASEAN's Summit held in Cebu, Philippines, the "ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers" was adopted as among significant agreements to improve the protection of migrant workers.

ASEAN has adopted a number of documents relating to human rights, such as:

1. Jakarta Declaration on the Elimination of Violence against Women in the ASEAN Region (Jakarta, 13 June 2004).
2. ASEAN Declaration against Trafficking in Persons Particularly Women and Children (Vientiane, 29 November 2004).
3. Vientiane Action Programme [VAP] (29 November 2004).
4. Declaration on the Establishment of the ASEAN Charter – 11th ASEAN Summit (December 2005).
5. ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (Cebu, 13 January 2007).

Aside from the above-mentioned documents, emphasis on human rights commitment is stated in the ASEAN Charter. Accordingly, the ASEAN Human Rights Body would be established to promote and to protect human rights and fundamental freedoms. This Body would be operated in accordance with the Terms of Reference (TOR) as determined during the ASEAN Foreign Ministers Meeting. This provision has arguably strengthened the member nations' commitment for cooperation to uphold human rights protection.

4. Preliminary Notes

Note that the inclusion of human rights provision in the Charter is a significant achievement in ASEAN history. This huge initial effort needs to be followed up by TOR which would be decided in the ASEAN Foreign Ministers Meeting in the future. Before the ASEAN community celebrates the establishment of an ambitious ASEAN Human Rights Body, there are some factors that need to be considered by citizens in the region.

a. Human Rights Values within ASEAN in General

It is widely acknowledged that human rights development level in the ASEAN region varies in each member state. Therefore, it would be very difficult to generalise human rights condition in the ASEAN without considering the

situation or development in every member state during development of TOR for the Body. As a parameter for this, there are only four states (out of 10) with National Human Rights Institutions that serve as domestic human rights monitoring and protection bodies.

While it is true that all member states have recognised the universal values of human rights, they differ in their implementation approaches. Some states prioritise economic rights when upholding human rights; others prioritise political rights, while the rest prioritise both. It is worth noting that the human rights developments within the region and within Europe were almost of the same level due to their long established civilisation history until that in Europe has advanced because of the collective efforts of the nations to establish a council.

From these conditions, ASEAN needs to improve on human rights awareness and to develop a human rights culture in a similar level by considering the condition in each member state. This effort could be done by all the national governments in socialising human rights “values” by all means of communication especially through formal and informal education channel. The massive efforts need to be conducted consistently without time limitation until institutionalisation of human rights values in the society of every ASEAN member state is created. Through the ASEAN slogan “sharing values” where every member states practices and shares values with each other, it is hoped that there would be common values that could uphold the hierarchy of values within the ASEAN community.³³

In relation to human rights values, some might argue that it is time for ASEAN members to recognise human rights, which could be crystallised into “ASEAN Human Rights Convention”.³⁴ This type of convention is expected to duplicate other regional human rights conventions in Europe, Africa, and America. It would bind human rights legislations of states that have ratified it so that enforcement could push through. The proponent of this concept argues that the ASEAN human rights convention need not copy other human rights convention; instead, it would be drilled from local wisdom that proliferate within the ASEAN community as its internal strength to uphold human rights. This convention would then be expected to become the main vehicle or leader in improving and protecting human rights not only within ASEAN but also in the entire Asia.

This motivational idea definitely needs to be acknowledged. However, there are at least three notions that should be remembered during its implementation. First, it should be noted that most of ASEAN member states are parties to several International Bill of Rights. Thus, the ASEAN human rights convention should not go against or replace the present international obligations. Second, the process needs a long period to get agreements on a proposed human rights convention. The ideal step, which is likely the effective way to do, is to urge a declaration. This declaration should point out recognition of the ASEAN human rights, which hopefully would be followed by a conference to make a convention.

³³ See Herman Joseph S. Kraft, “Human Rights, ASEAN and Constructivism: Revisiting the “Asian Values” Discourse” (2001) 22(45) Philippine Political Science Journal 33-54 and Karen Engle, “Culture and Human Rights: The Asian Values Debate in Context” (2000) 32 *International Law and Politics* 291-333.

³⁴ See Saneh Chamarik “ASEAN Human Rights: Prospects for Convergence”, Concluding remarks at the 3rd Workshop on the ASEAN Regional Mechanism on Human Rights, Bangkok, 27-29 May 2003. Available at <http://www.nhrc.or.th/ASEAN%20Human%20Rights.pdf>, accessed at 20 February 2008.

Lastly, if the convention is finally concluded, it should not have a sparring effect but a strengthening effect to current international bill of rights.³⁵

b. ASEAN's NHRIs Cooperation

It is obvious that human rights protection is a foremost domain for national authority in all ASEAN member states. Therefore, the establishment of National Human Rights Institution, which is the national authority for monitoring and protecting human rights in each country, becomes very important. For this effort, Indonesia, Malaysia, the Philippines, and Thailand are the states that should set examples. Since they have their NHRIs, they need to further cooperate by sharing their best practices not only for their own good but also for the good of other member states. They should help set guidelines for establishing NHRIs in other countries in the region.

c. Terms of Reference

As the main instrument for the Body, TOR should at least contain three elements that need to be reserved. First, the TOR should cautiously decide the Body's name, whether it is a Council or a Commission. Even though both names would have the same function, the composition of the Body would be affected. If it would be a Council, then it would consist of all representatives of states so that members' impartiality and integrity would be unquestioned. On the other hand, if it would be a Commission, it would not necessarily consist of 10 members because the membership of the commission is based on individual member's track record to ensure excellent impartiality and integrity. Besides, less than 10 members of the Commission would guarantee its work to be effective.

Second, it is extremely important to determine the Body's jurisdiction over the human rights violation complaints. The aim should be to minimise wider interpretation of human rights violations since the main responsibility for protecting human rights is in domestic authority. Therefore, it would be much related to the determination of exhaustion of local remedies mechanism. It could be argued that this mechanism becomes the most important part in the human rights protection process.

Emerging as customary international law,³⁶ exhaustion of local remedies should be clearly stated because of the culture of most ASEAN nations to settle their domestic problems within their national jurisdictions. It is very unlikely that an ASEAN member would raise a national problem to the regional level. Thus, when developing TOR, exhaustion of local remedies should be prioritised when setting protection of human rights. By doing so, the TOR would receive much better acceptance from ASEAN member states especially those that are accused of committing human rights violations. The setback from delayed ratification of the Charter should always be noted.

Lastly, it is also important to set measures if the remedies from a national authority are considered by the Body as not fulfilling the satisfaction of the violated rights. There should be a standard procedure on how an individual could file a human rights violation complaint against any member state. Would he/she be allowed to file a complaint directly to the Body (just like in the European system)?

³⁵ See Okere, above n 18.

³⁶ *Interhandel Case (Switzerland v. United States of America)*, 1959 ICJ Reports 27.

In general, it is harmless to take into account what the Amnesty International (the AI) had suggested in line with the establishment of the ASEAN human rights body. According to AI, when determining the terms and reference of the Body, ASEAN must prioritise and ensure that international human rights laws and standards would be used as benchmarks for all actions to be undertaken, as in the common practice of other regional human rights monitoring bodies. In relation to the body's membership, ASEAN must ensure that it is consisting of an independent, impartial, competent, well-resourced, and professional human rights body, whose membership reflects the region's diversity in culture as well as gender parity.³⁷

d. ASEAN Charter's Ratification Problem

As aimed in its preamble, the Charter would set ASEAN's existence more clearly: a rule-based international organisation that has international legal capacity. All future cooperation within or outside ASEAN would be based on legal agreement and not on political compromise. Nevertheless, as mandated by the Charter, TOR for the Body would mandate the commissioners to act according to their jurisdiction without any political interference from any member state.

All of the above-mentioned aspirations would be meaningless unless the Charter is finally ratified by all member states. It is a compulsory requirement for the Charter entry to be enforced. Even if the TOR is already completed and is made ready for adoption prior to the Foreign Ministers Meeting, the ASEAN human rights body would never come into reality due to several member states' reluctance to ratify the Charter.

Special note for Indonesia, it could be argued that the country should not hesitate to ratify the Charter because there is no disadvantage to its national interests. On the other hand, it would give Indonesia and ASEAN the legal capacity and bargaining position when they have to interact or cooperate with other states or other regional organisations such as the European Union, the Organisation of American States, and the African Union. Besides, ratification to the Charter is the articulation of recognition and acknowledgement of universal human rights values.

Conclusion

The promotion and protection of human rights is an important matter not only for South East Asia but also for all other regions worldwide. ASEAN, once again, has announced to the world that it is trying to uphold universal human rights values in the region through establishing the human rights body, which is stipulated in the ASEAN Charter. However, this plausible commitment to human rights protection would remain as an empty gesture unless they are followed by concrete action in a timely manner.

There are many considerations that should be taken into account in the development of the TOR for the Body, which would be approved in the Foreign Ministers Meeting. It is important to bear in mind that human rights development among ASEAN member states vary. To improve human rights standards, ASEAN with NHRIs must further cooperate to share experiences and best practices

³⁷ Amnesty International, "ASEAN: human rights in the Charter and beyond", 21 November 2007. Available at <http://www.amnestyusa.org/document.php?lang=e&id=ENGASA010092007>, accessed at 20 February 2008.

to other nations, which need significant improvements in their human rights standards.

The TOR, for the creation of an ASEAN human rights body, would determine the extent of willingness of the organisation and its members to realise human rights commitments. Two important decisions should be made. First, the TOR should cautiously decide the Body's name whether it is Council or Commission because it would have an effect to the membership of the body. Second, the Body's jurisdiction over the complaints of human rights violations should be determined. The aim would be to minimise wider interpretation of human rights violations reported to the Body since the main responsibility for protecting human rights is in domestic authority. Third, it is significant to determine the procedure for filing individual complaints against member states that allegedly violated human rights.

Finally, as members of the ASEAN which has the principle of people-to-people orientation, it is our responsibility to support and try to make its goals come true. It is wise to say that promoting and protecting human rights is better than keeping silence over violations in "our backyard."

Bibliography

Books

- Philippe Sands and Pierre Klein, *Bowett's of International Institutions*, fifth edition, Sweet & Maxwell, London, 2001.
- Rudolfo C. Severino, *Framing the ASEAN Charter. An ISEAS Perspective*, Institute of Southeast Asian Studies, Utopia Press Pte Ltd, Singapore, 2005.
- Locknie Hsu, "Towards an ASEAN Charter. Some Thoughts from the Legal Perspective" in Rudolfo C. Severino, *Framing the ASEAN Charter. An ISEAS Perspective*, Institute of Southeast Asian Studies, Utopia Press Pte Ltd, Singapore, 2005.

Journal Articles

- Denoon, David B. H., and Evelyn Colbert, "Challenges for the Association of Southeast Asian Nations (ASEAN)" 71(4) *Pacific Affairs* 1999.
- Bunyanunda, Mann, "Burma, ASEAN, and Human Rights: The Decade of Constructive Engagement, 1991-2001" 2 *Stanford Journal of East Asian Affairs* 2002.
- Katsumata, Hiro, "Why is ASEAN Diplomacy Changing? From "Non-Interference" to "Open and Frank Discussions"" 44(2) *Asian Survey* 2004.
- Kivimäki, Timo, "The Long Peace of ASEAN" 38(1) *Journal of Peace Research* 2001.
- Okere, B. Obinna, "The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems" 6(2) *Human Rights Quarterly* 1984.
- Greenberg, Jack and Anthony R. Shalit, "New Horizons for Human Rights: The European Convention, Court, and Commission of Human Rights" 63(8) *Columbia Law Review* 1963.

- Bernhardt, Rudolf, "Reform of the Control Machinery under the European Convention on Human Rights: Protocol 11" 89(1) *American Journal of International Law* 1995.
- Kokott, Juliane and Frank Hoffmeister, "Opinion 2/94, accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms" 90(4) *American Journal of International Law* 1996.
- Robertson, A.H., "The Council of Europe, 1949-1953-I" 3(2) *International and Comparative Law Quarterly* 1954.
- Robertson, A.H., "The Legal Work of the Council of Europe" 10(1) *International and Comparative Law Quarterly* 1961.
- Robertson, A.H., "The European Court of Human Rights", 9(1) *American Journal of Comparative Law* 1960.
- Kraft, Herman Joseph S., "Human Rights, ASEAN and Constructivism: Revisiting the "Asian Values" Discourse" 22(45) *Philippine Political Science Journal* 2001.
- Engle, Karen, "Culture and Human Rights: The Asian Values Debate in Context" 32 *International Law and Politics* 2000.
- Boyle, Elizabeth Heger and Melissa Thompson, "National Politics and Resort to the European Commission on Human Rights" 35(2) *Law & Society Review* 2001.

Conventions / International Agreements/International Decisions

- The ASEAN Declaration (Bangkok Declaration), Bangkok, 8 August 1967. Available at <http://www.aseansec.org/1212.htm>, accessed at 20 February 2008.
- Protocol Amending the Agreement on the Establishing of the ASEAN Secretariat, 22 July 1992. Available at <http://www.aseansec.org/1198.htm>, accessed at 20 February 2008.
- Council of Europe, ETS No. 155, "Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby". Available at <http://conventions.coe.int/Treaty/en/Treaties/Html/155.htm>, accessed at 20 February 2008.
- Interhandel Case (Switzerland v. United States of America), 1959 ICJ Reports 27.

Internet

- The National Human Rights Institutions Forum in Asia Pacific Region. Available at <http://www.asiapacificforum.net/members/apf-member-categories>, accessed at 20 February 2008.
- Rizal Sukma, "The Future of ASEAN: Towards a Security Community". Paper at a seminar on "ASEAN Cooperation: Challenges and Prospects in the Current International Situation", New York, 3 June 2003. Available at http://www.indonesia_mission-ny.org/issuebaru/Mission/asean/paper_rizalsukma.PDF, accessed at 20 February 2008.

- Vaughne Miller, "Protocol 11 and the New European Court of Human Rights" Research Paper House of Commons Library. Available at <http://www.parliament.uk/commons/lib/research/rp98/rp98-109.pdf>, accessed at 20 February 2008
- Mandate of the Council of Europe Commissioner for Human Rights, available at http://www.coe.int/t/commissioner/Activities/mandate_en.asp, accessed at 20 February 2008.
- European Court of Human Rights, "Organisation of the Court", available at <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/Organisation+of+the+Court/>, accessed at 20 February 2008.
- European Court of Human Rights, available at <http://www.echr.coe.int/ECHR/EN/Header/Applicouldts/Information+for+applicouldts/Frequently+asked+questions/>, accessed at 20 February 2008.
- Saneh Chamarik "ASEAN Human Rights: Prospects for Convergence", Concluding remarks at the 3rd Workshop on the ASEAN Regional Mechanism on Human Rights, Bangkok, 27-29 May 2003. Available at <http://www.nhrc.or.th/ASEAN%20Human%20Rights.pdf>, accessed at 20 February 2008.
- Amnesty International, "ASEAN: human rights in the Charter and beyond", 21 November 2007. Available at <http://www.amnestyusa.org/document.php?lang=e&id=ENGASA010092007>, accessed at 20 February 2008.